

1 HONORABLE BENJAMIN H. SETTLE
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 HP TUNERS, LLC, a Nevada limited liability)
11 company,) NO. 3:17-cv-05760-JRC
12 Plaintiff,)
13 vs.) **REPLY BRIEF IN FURTHER SUPPORT**
14 KEVIN SYKES-BONNETT and SYKED) **OF MOTION TO MODIFY EXPERT**
15 ECU TUNING INCORPORATED, a) **DISCLOSURE DEADLINES**
16 Washington corporation,)
17 Defendants.)
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19 NOW COME Plaintiff HP Tuners, LLC (“HPT”) for its Reply Brief in further support of
20 Motion to modify Expert Disclosure Deadlines entered in this case. In support thereof, Plaintiff
21 states as follows:

22 1. Good cause exists to modify the expert disclosure deadline, or, alternatively, the
23 scheduling order herein.

24 2. Defendants’ efforts to cast blame of Plaintiff for the progress of discovery are
25 misplaced and not well founded.

26 3. Contrary to Defendants’ protestations, Defendants have stalled, hindered, delayed
27 and obfuscated discovery to this point.

4. With regard to the Protective Order, Defendants caused the delay concerning its entry and; therefore, the corresponding document production by the parties in this case.

5. Contrary to Defendants' claims, the procedure history regarding the Protective Order issue is the following:

- a. January 9, 2018 – By email, Mr. Whitaker advised counsel for HPT that he would provide a draft of the Protective Order on January 9, 2018.
- b. January 24, 2018 – By email, counsel for HPT requests an update on the status of the draft Protective Order from Mr. Whitaker, which he had advised would be provided on January 9, 2018 but had not been provided.
- c. January 29, 2018 – Mr. Whitaker agrees that Defendants would produce documents upon the entry of a Protective Order. Mr. Whitaker still had not provided the draft which was promised.
- d. February 1, 2018 – By email, counsel for HPT requests another update on the status of the draft Protective Order from Mr. Whitaker.
- e. February 4, 2018 – Mr. Whitaker finally provides a draft of the Protective Order for counsel for HPT’s review.
- f. February 5, 2018 – The very next day, counsel for HPT provides comments to the draft Protective Order in clean and redline format for Mr. Whitaker’s review.
- g. February 5, 2018 – Mr. Whitaker responds that the proposed revisions to the draft Protective Order from counsel for HPT are not agreeable. Counsel for HPT responds immediately to Mr. Whitaker’s email on that day (2/5/18) to request his availability to discuss the issues raised by Mr. Whitaker.

- 1 h. February 9, 2018 – By email, after conferring with Mr. Whitaker by
- 2 phone, counsel for HPT provides a revised version of the draft Protective
- 3 Order in clean and redline format for Mr. Whitaker’s review,
- 4 i. February 27, 2018 – More than two weeks later, Mr. Whitaker advises that
- 5 he is agreeable to counsel for HPT’s revisions to the draft Protective Order
- 6 which had been provided on February 9, 2018 and proposes some
- 7 additional revisions.
- 8 j. March 1, 2018 – Counsel for HPT advises that he is agreeable to those
- 9 additional revisions and requests that Mr. Whitaker finalize and file the
- 10 Motion for Entry of Protective Order.
- 11 k. April 26, 2018 – By email, Counsel for HPT requests an update
- 12 concerning Mr. Whitaker’s filing of the Motion for Entry of Protective
- 13 Order, which he was supposed to file on or about March 1, 2018 – seven
- 14 (7) weeks earlier.
- 15 l. May 3, 2018 – Tired of waiting on Mr. Whitaker to finalize and file the
- 16 Motion for Entry of Protective Order, Counsel for HPT files the motion
- 17 for entry of Stipulated Protective Order.
- 18 m. May 11, 2018 – By email, Counsel for HPT seeks agreement from Mr.
- 19 Whitaker regarding an Amended Motion for Protective Order in response
- 20 to issues raised by the Court.
- 21 n. May 14, 2018 – By email, in a follow up email to the May 11, 2018 email,
- 22 Counsel for HPT seeks agreement from Mr. Whitaker regarding the
- 23 Protective Order issue raised by the Court.
- 24 o. May 18, 2018 – By email, in a second follow up email to the May 11,
- 25 2018 email because the May 11th and May 14th emails had been ignored,

Counsel for HPT seeks agreement from Mr. Whitaker regarding the Protective Order issue raised by the Court.

p. May 19, 2018 – By email, in a third follow up email to the May 11, 2018 email because the May 11th, May 14th and May 18th emails had been ignored, Counsel for HPT seeks agreement from Mr. Whitaker regarding the Protective Order issue raised by the Court.

q. May 21, 2019 – The Court entered the Protective Order.

6. Consequently, Defendants caused the 4-month plus delay in the entry of the Protective Order.

7. Moreover, obtaining discovery compliance has been equally as challenging as the Protective Order issue as Defendants have failed to comply with Plaintiff's discovery requests and produce requested documents.

8. On February 5, 2018, counsel for HPT sent an email to Mr. Whitaker regarding compliance issues in connection Defendants' responses to Plaintiff's First Requests for Production.

9. Despite numerous requests and communications to address the issues, as of June 4, 2018, Defendants had failed to remedy the various issues identified by counsel for HPT.

10. Thereafter, on June 4, 2018, counsel for HPT sent another email to Mr. Whitaker regarding Defendants' compliance with HPT's supplemental discovery requests.

11. Finally, on June 19, 2018, Mr. Whitaker made himself available for a meet and confer on the discovery issues. During that call, the parties agreed to an exchange of documents on July 13, 2018. While Mr. Whitaker disputes that such a discussion took place, counsel for HPT represents that an agreed upon exchange date was discussed.

12. As of June 19, 2018, Defendants compliance with written discovery was insufficient and incomplete, and remains insufficient and incomplete to date.

1 13. Upon receipt of Defendants' production on July 13, 2018, Plaintiff immediately
2 conducted an extensive review of the production to discover that the production is insufficient
3 and incomplete in several material respects.

4 14. Counsel for Plaintiff promptly requested a meet and confer which Mr. Whitaker
5 initially ignored.

6 15. Finally, after follow up communications, Mr. Whitaker agreed to participate in a
7 meet and confer, which is scheduled for July 30, 2018 because Mr. Whitaker was not available
8 until that week.

9 16. Contrary to Defendants' claims, Plaintiff could not proceed with the discovery
10 depositions of Defendants prior to receipt of the document production.

11 17. Therefore, Defendants' contentions that depositions could have proceeded earlier
12 is without merit. However, Defendants' delays in document production and discovery
13 compliance have prevented the depositions from going forward to this point. Moreover, despite
14 requests to proceed with the depositions in August or September, Defendants are not available
15 until September 25th and September 26th for depositions – two months from now.

16 18. As such, any claimed issues or prejudice as a result of the modification of the
17 schedule are not well founded as substantial discovery remains to be completed.

18 19. Defendants also misstate the issue concerning the inspection of Defendants'
19 software. In connection with the June 19, 2018 meet and confer, counsel for HPT discussed an
20 exchange of software with Mr. Whitaker.

21 20. Mr. Whitaker has failed to respond to several follow up communications
22 regarding this issue as HPT contemplated an exchange of the software not an inspection.
23 Plaintiff intends to once again address this issue in connection with the July 30th meet and confer.

21. As demonstrated herein, there are numerous outstanding discovery issues which exist and Defendants' attempts to cast blame for discovery delays on Plaintiff are unfounded and without merit. To the contrary, it is Defendants' who have caused the discovery issues to date.

22. While modification of the entire schedule was not requested by Plaintiff, to the extent that Defendants' believe that modification of the expert disclosures necessitates modification of the entire schedule, then the entire schedule should be modified.

23. It is extremely prejudicial to penalize where Defendants' tactics and non-compliance has caused the delays in written and oral discovery.

24. Defendants' compliance with discovery is necessary to proceed with the depositions and expert discovery.

25. There is no prejudice to Defendants in connection with a modification of the expert discovery schedule and/or the scheduling order.

26. For the reasons set forth herein, the expert disclosure deadlines should be modified. In the alternative, an amended scheduling order should be entered in this matter.

WHEREFORE, Plaintiff respectfully prays for an order extending the Expert Disclosure Deadline and the Rebuttal Expert Disclosure Deadline be extended to October 15, 2018 and November 15, 2018, respectively. In the alternative, an Amended Scheduling Order should be entered in this matter.

s/ Andrew P. Bleiman

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Attorneys for HP Tuners, LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all Counsel of Record.

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